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NO. 82 -5352

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY DARNELL WILLIAMS

Petitioner

-against-

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

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QUESTIONS PRESENTED

1. Whether the standard adopted by the North Carolina Supreme Court that permits the exclusion of a juror who states no more than she "is not positive" and "not sure" that she could recommend the death penalty is in conflict with the rule of Witherspoon v. Illinois, 391 U.S. 510, 522, n. 21, that a juror may not be excluded unless she "ma[kes] unmistakably clear . . . that [she] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . ."?

2. Whether the North Carolina Supreme Court misinterpreted Furman v. Georgia, 408 U.S. 238 (1972), in construing its death penalty statute to require - instead of permit - a capital verdict if the jury made three separate findings regarding a statutorily defined aggravating circumstance when the sole ground for the holding was the court's belief that its construction of the statute was compelled by this Court's decisions condemning unbridled jury discretion?

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NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY DARNELL WILLIAMS

Petitioner

-against-

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

Petitioner, Larry Darnell Williams, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at ___ N.C. ___, 292 S.E.2d 243 (1982), and is attached as Appendix A.

JURISDICTION

The opinion of the Supreme Court of North Carolina was issued on June 2, 1982. The judgment of the Supreme Court of North Carolina was issued on June 22, 1982, and is attached as Appendix B. On July 23, 1982, Justice Brennan extended the time for filing this petition to and including August 31, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted

below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides, in relevant part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .."

and the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the North Carolina death penalty statute, N.C. Gen. Stat. §15A-2000 *et seq.*, which is attached as Appendix C.

STATEMENT OF THE CASE

On June 11, 1979, the petitioner was arrested and questioned concerning an armed robbery and murder that occurred in Gaston County on June 2-3, 1979. Rp. 4. On September 10, 1979, the petitioner was indicted for the armed robbery and first degree murder of Eric Joines on June 2-3, 1979, in Gastonia, North Carolina. The case came on for trial on June 2, 1980, before the Honorable Frank W. Snepp, Jr. The case was tried as a capital case and the jury was death qualified.

The State's evidence at the guilt phase consisted solely of the testimony of two alleged accomplices, Darryl Brawley and Linda Massey. Brawley was fourteen years old at the time of the crime and a nephew of Massey. Rpp. 123-124. Massey was one of the petitioner's girlfriends at the time of the crime. Both Massey and Brawley testified that on June 2-3, 1979, they, accompanied by the petitioner and a man Brawley identified as "Danny Brown," drove to a gas station in Gastonia. The petitioner and "Danny Brown" robbed the gas station attendant and the attendant was shot. They left Gastonia and drove to Concord, North Carolina where the petitioner and "Danny Brown" robbed a woman at a convenience store and shot her also.[1] Some days after the crimes were committed Brawley was arrested for an unrelated offense and volunteered information about the murders. He made at least five pre-trial statements that were inconsistent with his trial testimony, at least two of which did not implicate the petitioner in the crimes.

Massey was arrested shortly after Brawley had implicated her in the crimes. After being threatened that her children would be taken away from her and she would be the first woman to go to the gas chamber, Massey passed out and lost her voice for two weeks. She managed, however, to answer police interrogation questions in a yes or no form in order to implicate the petitioner. The petitioner was then arrested.

---

1 The petitioner and a man by the name of Riley Devore were tried in Cabarrus County, North Carolina for the Concord crimes. Brawley identified Riley Devore as "Danny Brown." The jury acquitted Riley Devore of the crime, convicted the petitioner and sentenced him to death. The petitioner's death sentence in that case has since been vacated and remanded for a new sentencing hearing. State v. Williams I, 304 N.C. 394, 284 S.E.2d 437 (1981).

Both Massey and Brawley were indicted for first degree murder and armed robbery in both Cabarrus County and Gaston County. As a result of a plea agreement and in exchange for their testimony at trial, the charges against Massey and Brawley were reduced to accessory after the fact of murder in both cases. Massey was to receive a sentence of no more than ten years, the sentences to run concurrently, Rpp. 116-117, and Brawley was to be sentenced as a youthful offender. Rp. 124.

On the basis of Massey's and Brawley's testimony, the jury found petitioner guilty of first degree murder under the felony murder provision of North Carolina General Statute §14-17.

A trial on the sentencing phase then began. One aggravating circumstance was submitted to the jury -- whether the murder was committed as part of a course of conduct which included the commission of another crime of violence against another person. Rp. 337. The "other crime of violence" was the armed robbery-murder in Cabarrus County. Ten mitigating circumstances were submitted to the jury. Rpp. 338-339. The jury found the one aggravating circumstance submitted, found that the aggravating circumstance was sufficient to call for the death penalty, found seven mitigating circumstances and found that the aggravating circumstance outweighed the mitigating circumstances. Rpp. 337-339. Based on the mandatory instruction discussed below, the jury was, as a result of their findings, required to, and did, recommend death. Rpp. 339, 340. Petitioner appealed both the judgment of conviction and the sentence of death to the Supreme Court of North Carolina. Rp. 340. The decision of that court affirming petitioner's conviction and sentence was issued on June 2, 1982. 292 S.E.2d 243; Appendix A, infra.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner asserts here that prospective juror Nancy Melton was removed from his jury in violation of the limitations imposed by Witherspoon v. Illinois, 391 U.S. 510 (1968). The trial record shows:

NANCY MELTON

Q. [By the Court]: Never heard anybody talk about it or know anything about it at all?

A. (The juror shakes her head.)

Q. Now, in this case, if the defendant is found guilty beyond a reasonable doubt of first-degree murder, then the law of North Carolina provides that there will be another hearing before the same jury as to the punishment. In North Carolina the penalty -- the punishment for first-degree murder, nothing else appearing, is life imprisonment. However, our law provides that if at the second hearing before the jury the State satisifes the jury beyond a reasonable doubt that there exists what we call aggravating circumstances --

[brief interruption]

COURT: Now, if at that hearing the State satisfied the jury beyond a reasonable doubt that one of these or more of these statutory aggravating circumstances exist, then the jury must consider and recommend whether the punishment be life imprisonment or death, and that recommendation is binding on the court, and the court must enter judgment in accordance with the jurors' findings. Now, do you understand generally what the process is with that?

A. I do.

Q. And do you understand that if you are chosen to serve as a juror in this case you will first be required to determine whether the defendant is guilty or not guilty of armed robbery and first-degree murder?

Q. Do you understand that?

A. Yes.

Q. And do you understand it will be the duty of jurors at the conclusion of that phase of the case to return a verdict as to guilty or innocence in accordance with the instructions of the court as to the law of North Carolina?

A. Yes.

Q. If you are chosen as a juror, can you and will you do this?

A. Yes.

Q. Now, you understand that if the jury in this case finds the -- beyond a reasonable doubt that the defendant is guilty of first-degree murder, it will then be the duty of the same jury under the law of North Carolina to make a recommendation as to whether the defendant shall be punished by life imprisonment or death?

A. Yes.

Q. And do you understand that it is the duty of jurors during that phase of the case to make a sentence recommendation under -- in accordance with the law of North Carolina as will be explained by the court?

A. (The juror nods her head.)

Q. Now, if you serve as a juror in this case, could and would you if called upon to do so make a sentence recommendation of life imprisonment or death in accordance with the law as it will be explained to you by the court, or would you be unable to do so regardless of the law and the facts and circumstances revealed by the evidence because of some conscientious belief as to the proper punishment for first-degree murder; that is, that you conscientiously feel that it should in all cases be life in prison or you feel in all cases it should be the death penalty?

A. Your Honor, I'm not sure I could say that someone else had to die. I'm not sure I could do that.

Q. Well, it's -- this is something we have to determine at this stage -- whether you if you serve as a juror could follow the law of North Carolina and if you are satisfied beyond a reasonable doubt of those things which the law requires of you to be satisfied you could then return a recommendation of the death penalty.

A. I'm not positive I could do that. I've never been called on to do that, and I'm not sure that I could live with my conscience.

Q. Well, do you have conscientious beliefs about the death penalty -- religious beliefs about it?

A. Yes.

Q. And you do not feel that you could follow the instructions of the court if you were satisifed beyond a reasonable doubt of the things of which you must be satisfied. If those conclusions would call for the death penalty, you don't feel you could make such a recommendation?

A. I'm not sure that I could.

Q. Do you wish to ask her any questions?

DISTRICT ATTORNEY: The State would challenge her for cause.

MR. CLONINGER: We don't -- I don't wish to ask her any questions, Your Honor.

THE COURT: All right. The challenge for cause is allowed. Thank you, Mrs. Melton. I'm going to ask you to go up to Courtroom B. Judge Kirby will know whether he needs you for any other case. Okay. Thank you.

EXCEPTION NO. 15.

MR. CLONINGER: Could we for the record enter an objection to the exclusion of that juror, Mrs. Melton?

THE COURT: Now, gentlemen, I'm not going to -- if you want to try to rehabilitate a juror, you're going to do it. I'm not going to play games. Now, I gave you an opportunity to ask any questions you wanted to ask. What's the next juror's name?

Rpp. 54-57.

Petitioner noted in the record an appropriate exception,

Rp. 56, and made the following assignment of error:

> The Court erred in excusing for cause juror[ ] . . . Melton because of [her] views about capital punishment in violation of the principles established by the United States Supreme Court in Witherspoon v. Illinois and subsequent cases.

Rpp. 356-357. He argued this contention in his brief.

Defendant-Appellant's Brief, pp. 28-51.

The majority below, citing State v. Bernard Avery, 299

N.C. 126, 261 S.E.2d 803 (1980), rejected his argument.

> The fact that her negative responses were phrased as 'I'm not sure I could' or 'I'm not positive I could' does not equivocate her refusal to follow the law as given by the judge to such an extent as to make the challenge for cause improper. State v. Avery, 299 N.C. 126, 261 S.E.2d 803. It is apparent that Mrs. Melton was 'irrevocably committed before the trial [began], to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.' Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

Id. at 251.

Justice Exum dissented. 292 S.E.2d at 264.

> For the reasons stated in Part II of my dissenting opinion in State v. Pinch, supra [292 S.E.2d 203, 236-240] I conclude that prospective juror Melton was improperly excused for cause in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968).

In Pinch, he believed that two jurors' responses failed to make "'unmistakeably clear' that [they] would 'automatically' vote against the death penalty 'without regard to any

evidence which might be developed at the trial of the case.'" 292 S.E.2d at 237.

2. After all the evidence had been submitted in the penalty phase, the trial court charged the jury as follows:

> Now, ladies and gentlemen, for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt. . ..
>
> First, that one of the statutory aggravating circumstances existed. In this case, the evidence tends to show the existence of only one of the statutory aggravating circumstances, and I will speak more about it in a moment.
>
> Second, that the aggravating circumstance found by you is sufficiently substantial to call for the imposition of the death penalty;
>
> And third, that the aggravating circumstance found by you outweighs any mitigating circumstance or circumstances found by you.
>
> If all twelve of you find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.
>
> (R.pp. 323-324) (Emphasis added).

In the record on appeal, petitioner noted appropriate exceptions, R.pp. 324, 330, and made an assignment of error, complaining that the "court erred in instructing the jury that if the jury found the aggravating circumstances outweighed the mitigating circumstances, they must return a recommendation of death . . .." R.pp. 367-368. At the time of petitioner's trial, no contemporaneous objection was required to preserve an error in the jury instructions for appellate review. N.C. Gen. Stat. §15A-1446(d)(13). N.C. Gen. Stat. §15A-1446(d)(13) provides:

> (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . .
> (13) Error of law in the charge to the jury.

Petitioner argued in his brief on appeal, Defendant-Appellant's Brief, pp. 133-134, App-101-App-117, that "the

court improperly directed the jury to automatically recommend a sentence of death if it found that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty and that the aggravating circumstances outweigh the mitigating circumstances." Id. at 133. The identical issue had previously been submitted to the court in State v. Pinch, No. 70, Fall Term 1981. Accordingly, petitioner relied on the brief filed by Pinch on this issue and attached that portion of the Pinch brief to his own brief. App-101-App-117. The State argued in response, as it had in Pinch, that the construction of the statute urged by petitioner would violate the Eighth and Fourteenth Amendments as interpreted by this Court. Brief for State, pp. 80-84. It too relied upon its Pinch brief, id. at 81, and summarized its position by quoting from the following assertion it had made in that case: "'If the jury were allowed to make the further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman [v. Georgia, 408 U.S. 238 (1972)] simply does not allow.' State's brief in State v. Pinch, supra, at 71-72." Id. at 84.

Petitioner's brief in chief anticipated the State's argument. See Defendant-Appellant's Brief, App-105-112, App-114, App-117. A recapitulation of petitioner's position was:

> If the Georgia statute approved in Gregg [v. Georgia, 428 U.S. 153 (1976)], is sufficiently guided, if the Florida statute approved in Proffitt [v. Florida, 428 U.S. 242 (1976)] has sufficient standards, and if the Model Penal Code is also constitutional, then, under G.S. §15A-2000, as written, and with the construction urged here, the 'jury's discretion' is more than sufficiently 'channelled,' 'it is always circumscribed by legislative guidelines.' Gregg, 428 U.S. at 206-07. This must be so because G.S. 15A-2000 contains more standards and requires more findings than any of the other three.

Id. at App-114.

The North Carolina Supreme Court decided the constitutional issue first in Pinch. State v. Pinch, 292 S.E.2d 203 (1982). The majority there concluded that the instructions given were proper, 292 S.E.2d at 226-227, because defendant's construction of the statute would allow the jury "arbitrarily or capriciously [to] impose or reject a sentence of death" and "to exercise unbridled discretion . . .." 292 S.E.2d at 227. It further determined that petitioner's "contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979) . . ." and quoted from that case where it had said that "'[t]he exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman [v. Georgia, 408 U.S. 238 (1972)] and the cases which have followed it.' Id. at 35, 257 S.E.2d at 590." 292 S.E.2d at 227.

Justice Exum dissented. 292 S.E.2d at 230. He wrote:

> The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court . . . have made it abundantly clear that the majority's interpretation is not constitutionally required.

Ibid. He proceeded to determine that the instruction given was inconsistent with the statute and "tilts too much in favor of consistency at the expense of individualized consideration." 292 S.E.2d at 236. See, also, id. at 234. He, therefore, thought petitioner should receive a new sentencing hearing. Id. at 242.

In petitioner's case the majority, relying upon its decision in Pinch, rejected his contention. 292 S.E.2d 243, 262-263. It further emphasized its view that another construction of the statute would allow juries to "impose the sentence of death with unbridled discretion contrary to the dictates of Furman v. Georgia, 408 U.S. 238 (1972), and its successor cases." 292 S.E.2d at 263.

Justice Exum again disagreed, persisting in his dissent in Pinch:

> For the reasons stated in Part I of my dissenting opinion in State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982), I believe it was prejudicial error for the trial judge to instruct the jury that it had a duty to recommend the death sentence if it answered certain issues favorably to the state.

292 S.E.2d at 264.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE NORTH CAROLINA SUPREME COURT'S INTERPRETATION OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) ALLOWING FOR EXCLUSION OF JURORS WHO STATE THEY ARE NOT SURE THEY COULD IMPOSE DEATH IN ANY GIVEN CASE DEPRIVES THE DEFENDANT OF HIS LIFE WITHOUT DUE PROCESS OF LAW.

The petitioner at trial objected to the exclusion for cause of Mrs. Melton after the juror had expressed her feelings concerning the death penalty in the following manner:

> EXAMINATION BY THE COURT:
>
> . . .
>
> Q. Now, if you serve as a juror in this case, could and would you if called upon to do so make a sentence recommendation of life imprisonment or death in accordance with the law as it will be explained to you by the court, or would you be unable to do so regardless of the law and the facts and circumstances revealed by the evidence because of some conscientious belief as to the proper punishment for first-degree murder; that is, that you conscientiously feel that it should in all cases be life in prison or you feel in all cases it should be the death penalty?
>
> A. Your Honor, I'm not sure I could say that someone else had to die. I'm not sure I could do that.
>
> Q. Well, it's -- this is something we have to determine at this stage -- whether you if you serve as a juror could follow the law of North Carolina and if you are satisfied beyond a reasonable doubt of those things which the law requires of you to be satisfied you could then return a recommendation of the death penalty.
>
> A. I'm not positive I could do that. I've never been called on to do that, and I'm not sure that I could live with my conscience.
>
> Q. Well, do you have conscientious beliefs about the death penalty -- religious beliefs about it?

A. Yes.

Q. And you do not feel that you could follow the instructions of the court if you were satisifed beyond a reasonable doubt of the things of which you must be satisfied. If those conclusions would call for the death penalty, you don't feel you could make such a recommendation?

A. I'm not sure that I could.

Williams, 292 S.E.2d at 251.

The above questions and answers were the entire voir dire of Mrs. Melton concerning her beliefs about the death penalty.

A divided[2] North Carolina Supreme Court held, in reliance upon State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), that Mrs. Melton had "expressed sufficient refusal to follow the law of capital punishment, should it become applicable to the case, to justify her excusal for cause." 292 S.E.2d at 250. "The fact that her negative responses were phrased as 'I'm not sure I could' or 'I'm not positive I could' does not equivocate her refusal to follow the law as given by the judge to such an extent as to make the challenge for cause improper." 292 S.E.2d at 251. According to the court below, Mrs. Melton's responses of "I'm not positive I could do that. I've never been called on to do that and I'm not sure that I could live with my conscience" showed that Mrs. Melton was "'irrevocably committed before the trial [began] to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.'" 292 S.E.2d at 251.

The North Carolina Supreme Court has had numerous cases raising the question of whether jurors were excused for

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2 Justice Exum dissented. 292 S.E. at 264. As his dissent in this case relies upon his dissent in State v. Pinch, ___ N.C. ___, 292 S.E.2d 203, 236-240 (1982), a copy of the Pinch decision is attached as Appendix D.

cause in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968).[3] With the exception of two cases which were tried prior to the decision in Witherspoon and involved exclusions based on general beliefs in opposition to the death penalty,[4] it has never vacated a death sentence as a result of a Witherspoon violation.

There have been a series of cases involving jurors whose responses to the critical questions were, "I don't think so." In each of these cases, the defendant was granted no relief, although the court occasionally found that the jurors should not have been excluded under Witherspoon.

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3 State v. Spence and Williams, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969); State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969); State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Miller, 276 N.C. 681, 174 S.E.2d 481 (1970); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971); State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972); State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972); State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975); State v. Monk I, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. James Avery, 286 N.C. 459, 212 S.E.2d 142 (1975); State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975); State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975); State v. Smith, 290 N.C. 148, 226 S.E.2d 10 (1976); State v. Monk II, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Squire, 292 N.C. 494, 234 S.E.2d 563 (1977); State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Johnson II, 298 N.C. 355, 259 S.E.2d 752 (1979); State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Oliver and Moore, 302 N.C. 28, 274 S.E.2d 183 (1981); State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982).

4 State v. Spence and Williams, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

In State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), the first of these cases, a prospective juror stated that he was against capital punishment and did not believe he could return a verdict that would result in a death sentence. The North Carolina Supreme Court held that this juror was properly excluded for cause with no explanation. The court merely stated that it was clear that the juror had already made up his mind. 284 N.C. at 687. In State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), and State v. James Avery, 286 N.C. 459, 212 S.E.2d 142 (1975), the court followed Noell and found that the "I don't think so" responses were sufficient to exclude the jurors.

In State v. Monk I, 286 N.C. 509, 212 S.E.2d 125 (1975), State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975), and State v. Johnson II, 298 N.C. 355, 259 S.E.2d 752 (1979), the court apparently reversed itself and found that the jurors' responses of "I don't think so" were not sufficient under Witherspoon to conclude that they were "irrevocably committed" before trial. However, in these cases, the court granted no relief since it held further that jurors of this sort had not been systematically excluded. Its reading of Witherspoon that the exclusion of jurors must be systematic rather than just one, so as to entitle the defendant to a new sentencing hearing, was, of course, ultimately decided by this Court to be incorrect in Davis v. Georgia, 429 U.S. 122 (1976).

The court's view of whether jurors who stated that they did not think they could return a death verdict changed a third time beginning with State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980). Realizing that the holdings in State v. Monk I, supra, State v. Bernard, supra, and State v. Johnson II, supra, that Witherspoon violations would be

harmless if not systematic, were in error,[5] it held that once a juror indicates that he or she does not know or does not believe or does not think or is just unsure that he or she could impose or recommend death, that juror is "irrevocably committed" to vote against the death penalty and therefore could be excluded for cause under Witherspoon. The court did not acknowledge that this holding overruled Monk I, Bernard and Johnson II to the extent that they had determined that such jurors were not properly excludable.

In Bernard Avery, the court established its current standard by interpreting this Court's holding in Witherspoon to apply solely to those jurors who merely express general objections to the death penalty or merely express conscientious or religious scruples against infliction of the death penalty. If a juror expressed more than general objections to the death penalty, then, according to the North Carolina Supreme Court, that juror may be excluded without violating Witherspoon.

> In Witherspoon the United States Supreme Court held that veniremen may not be excluded from a jury on general objections to the death penalty or based on expressed conscientious or religious scruples against infliction of the death penalty. See also State v. Monk, 286 N.C. 509, 202 S.E.2d 125 (1975), second appeal, 291 N.C. 37, 229 S.E.2d 163 (1976).
>
> It is clear that jurors Averette and Curbeam expressed more than general objections to the imposition of the death penalty. Each affirmatively stated that he could not impose the death penalty regardless of the evidence presented. On this record the fact that their negative responses were phrased "I don't believe I would" and "I don't think so" does not equivocate their refusal to follow the law as given by the judge to such an extent as to make their challenge

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[5] Davis v. Georgia, supra, was decided by this Court in 1976. The North Carolina Supreme Court, however, as late as State v. Johnson II, supra, issued in 1979, continued to apply a standard requiring systematic exclusion. It was not until 1980 that the Court apparently realized that their systematic exclusion standard had been overruled by this Court.

for cause improper. See State v. Noell, 284 N.C. 670, 685-86, 202 S.E.2d 750, 760-61 (1974).

Bernard Avery, 299 N.C. at 137.

The Avery standard was again applied to an "I don't think so" juror in State v. Pinch, 292 S.E.2d at 213. Thus, in Avery and Pinch, "I don't know" is a "negative response" by the court's mere assertion and by its understanding of Witherspoon that anything less than an unmistakeable assurance that a juror could return the death penalty is grounds for removal.

Finally, in this case, the Avery device for excluding jurors with reservations about the death penalty is extended and applied to a juror who simply "does not know" and "is not sure" that she would vote for death. Even these answers, we are told, are, under Avery, "negative responses."

For fifteen years the North Carolina Supreme Court, despite this Court's repeated decisions reaffirming Witherspoon, has consistently shown that it will somehow or by some means avoid the dictates of Witherspoon so that jurors who might be affected by the decision to impose death will be excluded from juries. As Justice Exum stated in his dissent in State v. Pinch, 292 S.E.2d at 238-39, contained in Appendix D, a juror who states that he or she does not know or is unsure that he could impose death is merely stating that the death penalty would affect his or her decisions. Cf. Adams v. Texas, 448 U.S. 38 (1980). The juror is not stating unequivocally that under no circumstances could he or she recommend death. The standard now applied in North Carolina, as noted by Justice Exum, is in conflict with this Court's decisions in Witherspoon, Davis v. Georgia, supra, and Adams v. Texas, supra. It is likewise in conflict with a recent federal Court of Appeals decision. Granviel v. Estelle, 655 F.2d 673 (5th Cir.

1981) cert. denied, ___ U.S. ___, 102 S.Ct. 1836 (1982). This Court ought to grant review of this case to resolve this conflict and explicitly hold that a juror who states she is unsure about whether she could impose death cannot be excluded for cause.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS MISAPPREHENDED THE MEANING OF FURMAN V. GEORGIA, 408 U.S. 238, BY HOLDING THAT A CONSTRUCTION OF ITS DEATH PENALTY STATUTE WHICH WOULD PERMIT A JURY TO RENDER A LIFE VERDICT IF IT MADE THREE SEPARATE FINDINGS REGARDING AN AGGRAVATING CIRCUMSTANCE WOULD CONSTITUTE UNCONSTITUTIONAL UNBRIDLED DISCRETION.

In relying upon its decision in State v. Pinch, ___ N.C. ___, 292 S.E.2d 203, 226-227 (1982), the majority of the court below construed its death penalty statute, N.C. Gen. Stat. §15A-2000 et seq. (1977); Appendix C, to require - instead of permit - a capital verdict upon certain specific jury findings. 292 S.E.2d 243, 262-263. As in Pinch, 292 S.E.2d at 230, Justice Exum dissented, 292 S.E.2d at 264, on this point relying on his opinion in that case where he had concluded that this Court's decisions did not, as the majority believed, require such a construction of the statute to avoid the sort of unbridled discretion which Furman v. Georgia, 408 U.S. 238 (1972), prohibits and that the statute, properly construed, was violated by the trial court's instructions mandating a death verdict upon certain findings.

Petitioner's jurors had been instructed:

> "that if they found beyond a reasonable doubt that the aggravating circumstance existed, that it was substantially sufficient to call for the imposition of the death penalty, and that it outweighed any mitigating circumstance or circumstances found, then it would be their duty to recommend that the defendant be sentenced to death."

292 S.E.2d at 262. (Emphasis in original). He argued on appeal that this instruction was critically erroneous under

the statute. He insisted that the jurors should not have been instructed that if they made the three statutory findings "then it would be their duty to recommend that the defendant be sentenced to death." He argued that, upon making these findings, they should have been instructed instead that they may, although they need not, recommend that the defendant be sentenced to death, the conclusion subsequently reached by the dissenter in Pinch, 292 S.E.2d at 236.

Petitioner's submission here is the same as the petitioner's in Michael Edward Pinch v. State of North Carolina, No. 82-____, which is being filed contemporaneously with this petition. His position proceeds as follows: (1) The majority below felt compelled to construe its statute as it did because otherwise the jury would be permitted to "impose the sentence of death with unbridled discretion contrary to the dictates of Furman v. Georgia, 408 U.S. 238 (1972), and its successor cases." 292 S.E.2d at 263. (2) By construing its statute in reliance upon its view of this Court's constitutional decisions, a federal question is presented for review. Delaware v. Prouse, 440 U.S. 648, 653 (1979); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977); United Air Lines v. Mahin, 410 U.S. 623, 630-631 (1973); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 443 (1951); Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5 (1950); State Tax Commission v. Van Cott, 306 U.S. 511, 514 (1939); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924). (3) The federal question is whether a state procedure which requires for any capital jury verdict three separate findings regarding statutorily defined aggravating circumstances, but would leave to the jury finally "to dispense mercy on

the basis of factors too intangible to write into a statute . . .", Gregg v. Georgia, 428 U.S. 153, 222 (Opinion of White, J.), is "consistent and principled but also humane and sensible to the uniqueness of the individual", Eddings v. Oklahoma, ___ U.S. ___, ___, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, 8 (1982), or allows unbridled discretion condemned by Furman. (4) This issue is one of exceedingly critical importance for which state courts and legislators "deserve the clearest guidance that the Court can provide", Lockett v. Ohio, 438 U.S. 586, 602 (1978). (5) The constitutional "compulsion felt by [the majority below] is not warranted . . .." United Air Lines v. Mahin, 410 U.S. 623, 632 (1973). (6) Accordingly the Court should grant certiorari since "[i]f the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law.' Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5 (1950)." Delaware v. Prouse, 440 U.S. 648, 653 (1979).

Since this question presented and the reasons for review are identical in this case to those present in Pinch v. North Carolina, since the litigants relied upon the Pinch briefs in the North Carolina Supreme Court, Defendant-Appellant's Brief, pp. 133-134; Brief for State, pp. 80-84, and since the issue was disposed of by the court below as controlled by its holding in Pinch, petitioner therefore relies here on the reasons advanced by Pinch for granting certiorari to avoid burdening the Court with material which would be unnecessarily repetitious. The relevent portion of the petition in Pinch v. North Carolina, 82-___, filed contemporaneously with this petition, are attached as Appendix E.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: August 31, 1982.

Respectfully submitted,

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Ann Petersen
Assistant Appellate Defender

ATTORNEYS FOR PETITIONER

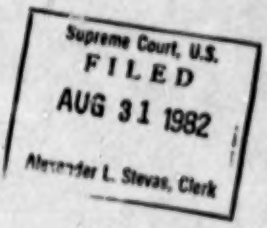
NO. 82 -5352

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982





LARRY DARNELL WILLIAMS

Petitioner

-v.-

STATE OF NORTH CAROLINA

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Larry Darnell Williams, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner's affidavit in support of this motion is attached hereto.

Adam Stein
Appellate Defender
Office of the Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602
(919) 733-9490

ATTORNEY FOR PETITIONER

NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

LARRY DARNELL WILLIAMS

Petitioner

-v.-

STATE OF NORTH CAROLINA

I, Larry Darnell Williams, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration from me. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Gaston County, a trial court of the State of North Carolina, of murder, and was sentenced to death. I am being held at Central Prison in Raleigh, North Carolina. I believe that errors were committed during the course of my trial in violation of my

constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

Larry Darnell Williams
LARRY DARNELL WILLIAMS

NORTH CAROLINA
WAKE COUNTY

The foregoing Affidavit of Larry Darnell Williams was subscribed and sworn to before me this 26th day of August, 1982.

Danny L Alford
Notary Public (SEAL)

August 9, 1986
My Commission Expires

DANNY L. ALFORD
NOTARY
PUBLIC
WAKE COUNTY, NC
My Commission Expires August 9, 1986

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No. 82 -5352

Supreme Court, U.S.
FILED
AUG 31 1982
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY DARNELL WILLIAMS,

Petitioner,

-against-

STATE OF NORTH CAROLINA

PETITIONER WILLIAMS' APPENDICES
